85-1424

No. _____

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

SONAT MARINE INC. as owner of the BARGE OCEAN STATES,

Petitioner,

v.

AMOCO OIL COMPANY and BAYCON INDUSTRIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE RULE OF THE CHINA, 74 U.S. (7 WALL) 53 (1869), WILL IMPOSE IN REM LIABILITY ON A PASSIVE AND FAULTLESS BARGE INVOLVED IN A COLLISION WHILE BEING TOWED BY TUGS UNDER THE CONTROL OF A COMPULSORY PILOT.

The Eleventh Circuit erred by imposing liability on the passive and faultless Barge OCEAN STATES. Binding precedent decided by this Court relieves a vessel without propulsion from liability for the faults of a compulsory pilot in charge of the tow so long as the towed (or "passive") vessel is not at fault in the collision. Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U.S. 48 (1919); The Eugene F. Moran, 212 U.S. 466 (1909); Sturgis v. Boyer, 65 U.S. 110 (1860).

INTERESTED PARTIES

The following persons were parties below and have an interest in the outcome of this case:

Amoco Oil Company

Baycon Industries, Inc.

Sonat Marine Inc.

Inter-Cities Navigation Corporation

The Barge OCEAN STATES

STATEMENT OF PARENT, SUBSIDIARY, AND AFFILIATE CORPORATIONS

Petitioner, Sonat Marine Inc. is affiliated with the following corporations:

Sonat, Inc.

Sonat Interocean Transportation Company

Interstate Barge Co.

Interstate Water Carriers Co.

Interstate Marine Transport Co.

Gellenthin Bulk Transport Corp.

Tug Interstate Co.

Ocean 80 Co.

Inter-Cities Navigation Corporation

Ocean 211 Company

International Bulk Transportation Co.

Sonat Marine (Maryland) Inc.

Boston Street Realty Corporation

International Bulk Transport Corporation

Tide 119 Co.

Main Iron Works, Inc.

Ocean 192 Company

Ocean 210 Company

Ocean 262 Company

Gulf States Barge Company

Gulf States Towing Company

Schuylkill Marine Corporation

Ocean 81 Company

Mariner Towing Company

Interstate Tugboat Company

Interstate Navigation Company

Interstate Towing Company

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OPINIONS BELOW

The Eleventh Circuit opinion which petitioner asks this Court to review is reported as Amoco Oil v. M/V Montclair, 766 F.2d 473 (11th Cir. 1985). It appears in the appendix to this petition at A-9.[1] The opinion of the United States District Court for the Middle District of Florida, Tampa Division, was not reported and appears in the appendix at A-1.

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[1] "A-" refers to the attached appendix.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Pursuant to 28 U.S.C § 1254(1), petitioner, Sonat Marine Inc. as owner of the Barge OCEAN STATES (the "OCEAN STATES"), files this petition for a writ of certiorari to the Eleventh Circuit Court of Appeals seeking review of the court's July 23, 1985, decision affirming the OCEAN STATES' liability, in rem, to the Amoco Oil Company and Baycon Industries, Inc. (A-9). OCEAN STATES' timely petitions for rehearing and rehearing en banc were denied November 25, 1985 without opinion.

The Eleventh Circuit's opinion imposes in rem liability on the Barge OCEAN STATES even though the OCEAN STATES was a motorless vessel under the complete control of two tugs and despite the fact that the OCEAN STATES and its crew were adjudged to be free of any fault in the

collision. This decision directly conflicts with decisions of this Court and decisions of the Second, Fourth, and Fifth Circuits that relieve passive and faultless vessels from in rem liability under the circumstances presented by this case. The OCEAN STATES files this petition for writ of certiorari seeking this Court's resolution of the conflict created by the erroneous decision below.

STATEMENT OF THE CASE AND FACTS

This case arises on undisputed facts which are here taken from the decision below. On July 10, 1981, an agent of the Barge OCEAN STATES contacted a towing corporation and the Tampa Bay Pilots Association to arrange for the towing of the OCEAN STATES. Pilot B. F. Wiltshire, a self-employed Tampa Bay Pilot, was contacted by the Pilots Association to take charge of the tow. At the time of the tow, the Barge OCEAN STATES was a "dumb barge" in that it had no independent means of motor propulsion and was manned only by a "riding crew" who were not involved in the navigation of the barge.

Pilot Wiltshire was a compulsory pilot neither selected nor supervised by OCEAN STATES. He was in charge of all aspects of the towing operation, including the positioning of the tugs and the direction of the riding crew aboard the OCEAN

STATES during the tow. Pilot Wiltshire underestimated the power necessary to control the barge in light of the wind conditions prevailing when the flotilla (consisting of the Barge OCEAN STATES and the two tugs) left the docks. As a result of his failure to properly evaluate wind and tide conditions, Pilot Wiltshire lost control of the Barge OCEAN STATES and it collided with and damaged Baycon barge #214 and the Amoco dock facility.

Pilot Wiltshire's negligence was the sole cause of the collision. The tugs maneuvering the barge and the riding crew under Pilot Wiltshire's control performed in all respects in accordance with his orders. There is no contention that the Barge OCEAN STATES was unseaworthy or that its riding crew caused or contributed in any way to the collision.

Baycon and Amoco sued Sonat Marine, the owners of the Barge OCEAN STATES,

in personam, and the barge itself, in rem, for the damages Baycon and Amoco sustained as a result of the collision.[2] Sonat Marine moved for summary judgment. Citing decisions of this Court and numerous circuit court decisions, Sonat Marine argued that in rem liability did not attach to a passive vessel under tow if the towed vessel was not at fault in the collision. The district court agreed that the OCEAN STATES was without fault but disagreed with Sonat's legal analysis. Summary judgment was denied and the Barge OCEAN STATES was held liable in rem (A-1, A-7).[3] Judgment on liability was entered and the damage issues were severed pending

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[2] The jurisdiction of the district court was predicated on 28 U.S.C. § 1333.

[3] The district court agreed that Sonat Marine was not liable in personam. That determination was not challenged on appeal.

appeal. The Eleventh Circuit affirmed (A-9), Amoco Oil v. M/V Montclair, 766 F.2d 473 (11th Cir. 1985).

ARGUMENT AND AUTHORITIES

THE RULE OF THE CHINA, 74 U.S. (7 WALL) 53 (1869), DOES NOT IMPOSE IN REM LIABILITY ON A PASSIVE AND FAULTLESS BARGE INVOLVED IN A COLLISION WHILE BEING TOWED BY TUGS UNDER THE CONTROL OF A COMPULSORY PILOT.

1. The Decision Below Irreconcilably Conflicts With Decisions Of This Court And The Second, Fourth, and Fifth Circuits.

The question facing the Eleventh Circuit, and now this Court is whether the OCEAN STATES, a barge with no independent means of propulsion, could be liable, in rem, when a compulsory pilot negligently caused two tugboats to tow the OCEAN STATES into a vessel and dock owned by Amoco and Baycon. OCEAN STATES relied on a line of decisions issued by this Court that hold that vessels without independent means of propulsion are not liable, in rem, when a collision is entirely caused by negligence of the

towing vessels or the independent compulsory pilot. There is no dispute in this case that the collision was entirely the fault of the compulsory pilot and that OCEAN STATES was without fault.

The Eleventh Circuit affirmed the district court without coming to grips with the core of the OCEAN STATES' argument. Analyzing the case, the court correctly pointed out that in admiralty, a vessel generally remains liable, in rem, even when the collision is entirely the fault of an independent compulsory pilot. This rule, which was first stated in The China, 74 U.S. (7 Wall) 53 (1868), is undoubtedly good law and was never challenged by the OCEAN STATES. However, the panel decision erred when it held that "The China is the complete answer in this case." 766 F.2d at 475. While acknowledging the general rule, OCEAN STATES relied instead on a long line of cases

originating in decisions of this Court that formulate an exception to the rule of The China in cases involving vessels such as the OCEAN STATES under tow and with no independent means of propulsion. These cases hold that, despite the rule of The China, a passive and faultless vessel under tow is not held liable, in rem, when the collision is entirely due to the fault of others. Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern Dist. Terminal, 251 U.S. 48 (1919); The Eugene F. Moran, 212 U.S. 466 (1909), overruled on the issue of comparative negligence, United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Sturgis v. Boyer, 65 U.S. 110 (1860). These cases, not The China, provide the answer to this case.

In Sturgis, plaintiff proceeded in rem against the ship WISCONSIN for damages suffered when the WISCONSIN struck

and capsized plaintiff's lighter. At the time of the accident, the WISCONSIN was being towed by a tug. The pilot of the tug was completely in charge of all aspects of the tow. The Supreme Court rejected the application of in rem liability to the WISCONSIN. Rather, the Court decided that in rem liability would be imposed upon those at fault in the collision and would not be applied to the passive, faultless, towed vessel. According to the Court, the towed vessel "is no more responsible for the consequences of the collision than so much freight." 65 U.S. at 122.

Justice Holmes' opinion in The Eugene F. Moran, 212 U.S. 466 (1909), confirmed that the legal analysis in Sturgis survived to form an exception to the intervening Supreme Court decision in The China. In The Eugene F. Moran, the defendant's car float was sued, in rem,

for damages sustained when the float was towed into two scows owned by the plaintiff. The Court held that the car float was not liable, in rem, for the negligence of those responsible for the tow:

> We see no reason why the [Sturgis] decision should not stand. No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible, on principles of agency or otherwise, is carried further here than in England . . . But after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached.

212 U.S. at 474 (citations omitted).

Had the Court simply applied the general rule of The China, there is no

question that the car float would have been liable, in rem. However, Justice Holmes recognized that it would be unwarranted to extend The China to impose in rem liability on all flotilla members. Instead, the opinion makes clear that under The China liability, in rem, is charged to only the flotilla members who are at fault in the collision. Id. at 474-75.

The same issue arose in a slightly different context in Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U.S. 48 (1919). In Liverpool, Brazil, the same defendant owned the vessel at fault (the tug) and the passive car float. Justice Holmes writing on the issue of in rem liability once again, held that for limitation purposes, the owner would be liable, in rem, only up to the value of the tug. The value of the car float was

not included in the limitation. Citing The Eugene F. Moran the court stated:

> The car float was the vessel that came in contact with the Vauban, but as it was a passive instrument in the hands of the Intrepid, that fact does not affect the question of responsibility . . . These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it.

251 U.S. at 52.[4]

Liverpool, Brazil, The Eugene F. Moran, and Sturgis were extensively

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[4] This Court most recently addressed this issue in Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955), in which it reversed the Fourth Circuit's imposition of liability on a passive tow. The Fourth Circuit had imposed liability by virtue of a provision in the towing contract between the tug and the tow. On the basis of Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) this Court held the liability provision in the contract ineffective. However, both the Fourth Circuit and this Court agreed that, in the absence of the contractual provision shifting liability, the tow would not be liable for the faults of the tug. 349 U.S. at 122-23.

analyzed by the OCEAN STATES both before the district court and on appeal. However, neither opinion below makes reference to these cases or to the long line of circuit and district court cases which apply the rule of the Sturgis, Moran, and Liverpool, Brazil to absolve passive, faultless vessels under tow from liability.[5] Thus, the decision below is

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[5] Tebbs v. Baker-Whitely Towing Co., 407 F.2d 1055 (4th Cir. 1969); Slaten v. Hopemount Shipping Co., 345 F.2d 451 (5th Cir. 1965); New York v. McAllister Bros., Inc., 299 F.2d 227 (2d Cir. 1962); United States v. SS Washington, 241 F.2d 819 (4th Cir. 1957), cert. denied, 355 U.S. 817 (1957); Compania Maritima S.L. v. Moran Towing and Transp. Co., 197 F.2d 607 (2d Cir. 1952); Harbor Towing Corp. v. Atlantic Mutual Ins. Co., 189 F.2d 409 (4th Cir. 1951); The Rebecca, 152 F.2d 607 (4th Cir. 1945); Naamlooze Venootschap Maatschappij Stoomship Barendrecht v. Moran Towing and Transp. Co., 9 F.2d 614 (2d Cir. 1925); Walker v. Tug Diane, 350 F.Supp. 1388 (D. V.I. 1972); Dow Chemical Co. v. Tug Thomas Allen, 349 F.Supp. 1354 (E.D. La. 1972) (recognizing the general rule but holding against the tow because the tow was partly at fault in the collision); In re Tug Management Corp., 330

not only in direct conflict with decisions of this Court, but also the Second, Fourth and Fifth Circuits.

The Second Circuit first addressed this issue in an opinion written by Judge Learned Hand in Naamlooze Venootschap Maatschappij Stoomship Barendrecht v. Moran Towing and Transportation Co. (The BARENDRECHT), 9 F.2d 614 (2d Cir. 1925). The BARENDRECHT was in the tow of the tug Moran. Because of the negligence of the pilot of the tug, the BARENDRECHT collided with the dredge ATLANTIC. The district court found the BARENDRECHT liable, in rem, holding under the general rule of

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F.Supp. 486 (E.D. Pa. 1971); Petition of Harbor Towing Corp., 310 F.Supp. 775 (D. Md. 1970), aff'd, 438 F.2d 535 (4th Cir. 1971); Chesapeake Bay Bridge & Tunnel Dist. v. Oil Screw Prince, 298 F.Supp. 881 (D. Md. 1967); United States v. Tug Parris Island, 215 F.Supp. 144 (E.D.N.C. 1963). See Parks, Law of Tugs, Tow, and Pilotage, 1050-51 (2d ed. 1982); Gilmore and Black, The Law of Admiralty, 515-16.

The China that the faults of the pilot were imputed to the tow. The Second Circuit reversed, holding that the rule of The China did not apply to the passive and faultless members of the flotilla. According to Judge Hand, so long as the BARENDRECHT was not responsible for the collision that occurred while it was under tow, in rem liability would not be imputed to her. 9 F.2d at 616. More recent Second Circuit decisions are in accord. See New York v. McCallister Bros., Inc., 299 F.2d 227 (2d Cir. 1962); Deep Sea Tankers v. The Long Branch, 258 F.2d 757 (2d Cir. 1958), cert. denied, 358 U.S. 933 (1959); Compania Maritima S.L. v. Moran Towing and Transportation Co., 197 F.2d 607 (2d Cir. 1952).

The most representative case arising out of the Fourth Circuit is Harbor Towing Corp. v. Atlantic Mutual Insurance Co., 189 F.2d 409 (4th Cir. 1951). Harbor

Towing addresses a steel barge that collided with the motor vessel RUTH CONWAY while the barge was in the tow of the tug HUSTLER. The district court determined that the accident was caused by the negligent operation of the tug and that the barge was in no way at fault in the accident. Although much of the opinion deals with the interpretation of an insurance policy held by the owner of the tug and barge, the opinion reiterates the rule that the passive, motorless barge was not responsible, in rem, for the fault of the tug. The faults of the pilot would not automatically attach to all flotilla members:

> The liabilities of tug and tow to third persons depend on their separate and individual faults. If by the tug's fault solely the tow was injured by the impact with a third person's interest the tow cannot recover from the third party. But if the third party is injured by impact of the tow upon his interest the

> tow is not liable unless it was itself at fault. The fault of the tug is not imputed to the tow and, unlike the case of vessels in charge of pilots or charterers, no maritime liens on the tow, or its cargo, accrue in favor of the third person.

189 F.2d at 414, citing, Robinson on Admiralty, page 679. See also Tebbs v. Baker-Whitely Towing Co., 407 F.2d 1055, 1057 (4th Cir. 1969); United States v. SS Washington, 241 F. 2d 819, 825 (4th Cir. 1957); Boston Metals Co. v. The Winding Gulf, 209 F.2d 410, 411 (4th Cir. 1954), reversed on other grounds but affirmed on this point, 349 U.S. 122 (1955).

The conflicts between the Eleventh Circuit's opinion below and the Fifth Circuit could hardly be clearer.[6] In

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[6] Because of the historical connection between the Fifth and Eleventh Circuits, it could be argued that the decision below and PENN VANGUARD were decided by the same circuit. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). However, for the purposes of this Court's review, the decision below

Tampa Ship Repair & Drydock Co. v. A. P. St. Philip, Inc., (The PENN VANGUARD), 440 F.2d 1193 (5th Cir. 1971), aff'g, 1971 A.M.C. 1549 (M.D. Fla. 1971), the Fifth Circuit addressed a case arising on strikingly similar facts. The PENN VANGUARD was in Tampa Bay for delivery to a drydock company for repairs. Although she was a ship, usually capable of operating under her own power, her machinery was not operating and her crew was discharged. She was thus described by the district court as a "dead" ship. As in this case, the tow was supervised by an independent pilot who lost control of the vessel during the tow and caused it to damage plaintiff's

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erroneously creates a conflict in the law of the existing Fifth and Eleventh Circuits. Accordingly, OCEAN STATES respectfully submits that decisions of the Fifth as well as the Fourth and Second Circuits be relied on to demonstrate the conflict in this case. In any event, the PENN VANGUARD demonstrates the clear error of the decision below.

dry dock. The PENN VANGUARD, like the OCEAN STATES, was seaworthy and without fault. However, unlike the OCEAN STATES, the PENN VANGUARD was completely absolved of liability. As "the mere passive instrument by which the drydock was damaged," the PENN VANGUARD could not be held liable, in rem despite the faults of her pilot. 1971 A.M.C. at 1553. The district court's decision was affirmed in all respects by the former Fifth Circuit. See also, Slaten v. Hopemount Shipping Co., 345 F.2d 451 (5th Cir. 1965).

Of the extensive precedent discussed above, nearly all of which was presented to both the district court and the Eleventh Circuit, PENN VANGUARD is the only decision that the district court or the Eleventh Circuit attempted to distinguish. Both made the same error. Each held that the tow in PENN VANGUARD was absolved of liability, not because it was a passive

and faultless vessel under tow, but because it was completely withdrawn from navigation and thus outside the reach of admiralty jurisdiction. 766 F.2d at 477-78, A-18 to A-26. According to the decision below, every towed vessel remains liable, regardless of fault, unless it is withdrawn from navigation. Id. Because the Barge OCEAN STATES was in navigation (OCEAN STATES never contended otherwise) the panel concluded that PENN VANGUARD was inapposite.

The essential premise of the court's holding is incorrect. The PENN VANGUARD was not withdrawn from navigation just because its engines were shut down and its crew discharged while the vessel was on the way to drydock. Numerous decisions have made clear that vessels are withdrawn from navigation only if they have been taken out of maritime service permanently. M/V Marifax v. McCrory, 391 F.2d 909, 910

(5th Cir. 1968) ("even fifteen years of resting inertia does not necessarily destroy navigability"). Thus, a vessel under repair or in drydock is not withdrawn from navigation. A-1 Industries v. Barge Rig #2, 1979 A.M.C. 1486 (E.D. La. 1979).[7]

The Eleventh Circuit's decision completely overlooks the fact that PENN VANGUARD relied upon the very United States Supreme Court decisions that OCEAN STATES argues form an exception to the rule of The China for passive, faultless

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[7] Perhaps the fatal confusion in both courts below arises from the PENN VANGUARD's unfortunate description of the towed vessel as a "dead ship." This terminology is often used in maritime lien cases to describe vessels withdrawn from navigation. However, the term is just as often used to describe vessels without motor power; Compania Maritima S.L. v. Moran Towing and Transp. Co., 197 F.2d 607, 608-09 (2d Cir. 1952); Tebbs v. Baker-Whitely Towing Co., 407 F.2d 1055 (4th Cir. 1969). Park, The Law of Tug, Tow and Pilotage (2d Ed. 1982) 1050-51.

vessels in navigation. 1971 A.M.C. at 1553, citing, The Eugene F. Moran, 212 U.S. 466 (1909); Sturgis v. Boyer, 65 U.S. 110 (1860). The vessels absolved of in rem liability in these Supreme Court decisions were unquestionably in navigation.

In Sturgis, the WISCONSIN had a full crew aboard. In both The Eugene F. Moran and Liverpool, Brazil, the car floats were in service when they were involved in the collision. These cases contain no discussion of the issues typically raised when a party contends that a vessel is withdrawn from navigation and therefore beyond the reach of admiralty law. See e.g., In re Queen, 361 F.Supp. 1009 (E.D. Pa. 1973). Had the PENN VANGUARD decision rested upon the vessel's status in navigation, the court would undoubtedly have

relied upon an entirely separate line of cases.[8]

Neither PENN VANGUARD nor the precedent of this Court upon which it relies can be distinguished. The decision below, which irreconcilably conflicts with this precedent should be reversed.

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[8] If the PENN VANGUARD was withdrawn from navigation and thus not susceptible to maritime lien, how could the PENN VANGUARD court have had in rem jurisdiction over the vessel? The maritime lien cases so thoroughly discussed by the court below deal with cases in which the dead ship seeks dismissal for lack of in rem jurisdiction. There is a critical distinction between a claim against an alleged "vessel" that is dismissed for lack of in rem jurisdiction and a claim that is dismissed because the vessel, though subject to admiralty jurisdiction, is not liable, in rem. The PENN VANGUARD and the other dead ship cases cited by OCEAN STATES were unquestionably subject to admiralty jurisdiction.

2. The Conflict Created By The Decision Below Should Be Resolved By This Court.

OCEAN STATES' research has disclosed no opinion imposing *in rem* liability on a passive, faultless vessel under tow. Plaintiffs cited no such decision to either court below. The Eleventh Circuit's decision cites no such case.[9] The decision below thus creates dissonance where only harmony existed before. This conflict should be resolved by this Court.

One of the most common legal relationships in all of admiralty is that between a vessel under tow, the tug providing the motor power, and the pilot

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[9] The only case cited by the Eleventh Circuit, Gulf Towing Company, Inc. v. The Steam Tanker Amoco New York, 648 F.2d 242 (5th Cir. 1981), is no more than a reiteration of the general rule of *The China*, which the OCEAN STATES does not dispute here. All of the vessels in *Gulf Towing* were active vessels under their own power.

supervising the tow. Even though the law in this area has been clear and well-settled for a century, the many cases cited in this petition indicate that the towage relationship is subject to frequent litigation. With the uncertainty introduced by the Eleventh Circuit's decision below, litigation involving the proper distribution of in rem liability among flotilla members is likely to multiply geometrically. Accidents involving vessels under tow has long been a subject of fertile litigation, litigation which will certainly be encouraged and amplified by the Eleventh Circuit decision below.

OCEAN STATES also understands that this Court can only accept a very limited number of cases for complete briefing on the merits. Should this Court come to the conclusion, after reviewing the petition for certiorari and the response, that the law is as well-settled and the question is

clear as the petitioner believes it is, this Court may decide that a full opinion is not warranted. Even so, the conflict created by the decision below is an important and potentially troublesome one that should be addressed.

Petitioner respectfully suggests two alternatives if this Court is not inclined to order full briefing on the merits. In recent years this Court has summarily reversed many cases on the certiorari papers when the error has been clear and further briefs and oral argument would provide no additional assistance. E.g., Payne v. Virginia, ___ U.S. ___, 82 L.Ed.2d 801 (1984); Burger v. Zant, ___ U.S. ___, 81 L.Ed.2d 360 (1984); Cardwell v. Taylor, 461 U.S. 571 (1983); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982).

A second alternative, stopping short of a summary reversal on the merits, would

be to reverse the court below and to remand for reconsideration of the case in light of the Supreme Court precedent discussed above, specifically Liverpool, Brazil, The Eugene F. Moran, and Sturgis v. Boyer. The Eleventh Circuit's fundamental error was to rely solely upon the general rule of The China (never disputed by OCEAN STATES) while failing to analyze or even cite the Supreme Court cases upon which OCEAN STATES relied so heavily in its initial brief. If the Eleventh Circuit is given another opportunity to address these cases, which form a clear exception the general rule of The China, perhaps the conflict can be resolved without the necessity of full briefing on the merits before this Court. Even if the Eleventh Circuit decides that these cases are distinguishable on some basis and reaffirms its earlier judgment, at least this Court will have the benefit of the

Eleventh Circuit analysis of the exception in the subsequent petition for certiorari that will certainly follow.

CONCLUSION

The Eleventh Circuit's opinion below is in direct conflict with opinions of this Court and opinions of the Second, Fourth, and Fifth Circuit Courts of Appeal. The court erred by failing to analyze those cases that form a clear exception to the general rule of The China for passive, faultless vessels under tow. OCEAN STATES respectfully requests this Court to issue the writ of certiorari and review the judgment and opinion of the Eleventh Circuit Court of Appeals. In the alternative, petitioner respectfully requests this Court to reverse and remand to the Eleventh Circuit to permit the court below to decide this case after specific analysis of the Supreme Court and circuit court precedent upon which OCEAN STATES relies.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMOCO OIL COMPANY,

Plaintiff,

vs. Case No. 82-23-Civ-T-WC

M/V MONTCLAIR, etc., et al.,

Defendants.

BAYCON INDUSTRIES, INC.,

Plaintiff,

vs. Case No. 82-24-Civ-T-WC

M/V MONTCLAIR, etc., et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for hearing on August 9, 1984. This case arises out of a collision on July 10, 1981 when the barge OCEAN STATES struck plaintiff Amoco's Oil Dock and plaintiff Baycon's Crane Barge. By prior Court-approved stipulation, the issue of damages

was severed and the Court considered only the issue of liability. The parties agreed that designated excerpts from four depositions formed a sufficient basis for the Court's factual findings. After considering those depositions, the pleadings, and argument of counsel, the court concludes the following:

Findings of Fact

1. Plaintiff Amoco Oil Company was at all material times the owner and operator of a marine terminal facility in the Port of Tampa, Florida.

2. Plaintiff Baycon Industries, Inc. was the owner or operator of Crane Barge 214, a vessel used by Plaintiff Baycon in its marine construction business.

3. The Baycon Industries Crane Barge 214 had been doing construction and repair work at the Amoco Oil Dock. At ap-

proximately 1800 hours on the evening of July 10, 1981 the Crane Barge was moored in a fixed position alongside the Amoco Oil Dock Terminal.

4. At the time of the collision, on July 10, 1981, the barge OCEAN STATES was a seagoing tank barge, documented under the laws of the United States and operated by Interstate Ocean Transport Corporation. The barge OCEAN STATES is now owned by claimant Sonat Marine, Inc.

5. On July 10, 1981 the barge OCEAN STATES was under the command and control of Captain B. F. Wiltshire, a state and federally licensed pilot doing business with the Tampa Bay Pilots Association.

6. The barge OCEAN STATES is an oil barge required to have a federal pilot pursuant to 46 U.S.C. §§ 224, 364, and 391.

7. On July 10, 1981 the barge OCEAN STATES departed from the Fina Terminal Dock and proceeded approximately one half mile south toward the Amoco Oil Dock in the Port of Tampa.

8. Barge OCEAN STATES departed from the Fina Terminal with assist tugs MONTCLAIR and A.P. ST. PHILIP. Captain Wiltshire gave orders to the tugs from aboard the OCEAN STATES. Also on the OCEAN STATES was a riding crew responsible for handling the lines for docking and undocking.

9. While Captain Wiltshire was maneuvering the barge, it collided with Baycon Barge No. 214 at the Amoco Oil Dock. The collision occurred as a result of Captain Wiltshire's failure to properly evaluate the wind and tide conditions. The OCEAN STATES went out of control, and Captain Wiltshire allowed it to collide

with the Baycon Crane Barge in an effort to regain control. The OCEAN STATES struck both the Baycon Crane Barge and the Amoco Oil Dock facility before coming to a stop.

10. During the manuever the assist tugs performed in accordance with Captain Wiltshire's orders.

Conclusions of Law

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1333.

2. The legal and proximate cause of the July 10, 1981 collision between the barge OCEAN STATES and the Amoco Oil Dock and Baycon Crane Barge was the negligence of Pilot Wiltshire in failing to maneuver the barge in accordance with the prevailing wind and tide conditions.

3. Because Captain Wiltshire was a compulsory pilot under federal regulation, Claimant Sonat Marine is not liable in

personam for Captain Wiltshire's negligence.

4. At the time of the accident the barge OCEAN STATES was a vessel in navigation as that term is used in 1 U.S.C. § 3.

5. For the reasons stated in the Court's Order of September 9, 1983, the Court finds that the barge OCEAN STATES was not a "dead ship" at the time of the accident. Therefore, the barge OCEAN STATES is liable in rem for the collision which resulted from the negligence of its servant, Captain B. F. Wiltshire.

Judgment will be entered accordingly.

DATED at Tampa, Florida this 16th day of August, 1984.

/s/ William J. Castagna

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMOCO OIL COMPANY,

Plaintiff,

vs. Case No. 82-23-Civ-T-WC

M/V MONTCLAIR, etc., et al.,

Defendants.

BAYCON INDUSTRIES, INC.,

Plaintiff,

vs. Case No. 82-24-Civ-T-WC

M/V MONTCLAIR, etc., et al.,

Defendants.

JUDGMENT

This matter came on for trial before the Court, and the issue of liability having been tried and a decision having ben rendered, it is

ADJUDGED:

That the barge OCEAN STATES is liable in rem for the damages suffered by Plaintiffs Amoco Oil Co. and Baycon Industries, Inc., and that claimant Sonat Marine, Inc. is not liable in personam for the negligence of Captain B. F. Wiltshire.

DATED at Tampa, Florida this 16th day of August, 1984.

/s/ William J. Castagna

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

AMOCO OIL, Plaintiff-Appellee,

v.

M/V MONTCLAIR, etc., et al., Defendants,

BARGE OCEAN STATES, Her Engines, Tackle, Apparel, etc., In Rem, Defendant-Appellant.

BAYCON INDUSTRIES, INC., etc., Plaintiff-Appellee,

v.

M/V MONTCLAIR, etc., et al., Defendants,

BARGE OCEAN STATES, Her Engines, Tackle, Apparel, etc., In Rem, Defendant-Appellant.

No. 84-3610

United States Court of Appeals, Eleventh Circuit.

July 23, 1985.

David F. Pope, MacFarlane, Ferguson, Allison & Kelly, Tampa, Fla., for plaintiffs-appellees.

Steven L. Brannock, Holland & Knight, David W. McCreadoe, Tampa, Fla., for defendant-appellant.

Appeal from the United States District for the Middle District of Florida.

Before KRAVITCH and HATCHETT, Circuit Judges, and THOMAS*, District Judge.

DANIEL HOLCOMBE THOMAS, District Judge:

This is an appeal from the United States District Court for the Middle District of Florida. We affirm.

The undisputed facts in this case are as follows: On July 10, 1981, an agent of the Barge OCEAN STATES contacted a towing corporation and the Tampa Bay Pilots Association to arrange for the towing of the OCEAN STATES from the Fina Terminal to Tampa Barge Services in Tampa Bay. Pilot B.F. Wiltshire, a self-employed Bar Pilot, was contacted by the Pilot's Association to take charge of the tow. At the time of the tow, the Barge OCEAN STATES had no propulsion and was manned by a "riding crew" who were not involved in the

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*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

navigation of the barge. Pilot Wiltshire was a compulsory pilot, neither selected nor supervised by OCEAN STATES. He was in charge of all aspects of the towing operation including the positioning of the tugs and the direction of the riding crew aboard the OCEAN STATES during the tow. Pilot Wiltshire underestimated the power necessary to control the barge in light of the wind conditions prevailing when the flotilla (consisting of the Barge OCEAN STATES and two tugs) left the Fina Docks. As a result of his failure to properly evaluate the wind and tide conditions, the Barge OCEAN STATES collided with and damaged Baycon Barge #214 and the Amoco dock facility. Pilot Wiltshire's negligence was the sole cause of the collision. The tugs maneuvering the barge and the riding crew under Pilot Wiltshire's control performed in all

respects in accordance with his orders. There was no contention that the barge OCEAN STATES was unseaworthy or that its riding crew caused or contributed in any way to the collision.

Baycon and Amoco sued the owners of the Barge OCEAN STATES in personam and the barge itself, in rem, for the damages that were sustained as a result of the collision.[1]

The Barge OCEAN STATES moved for a summary judgment. The district court denied summary judgment holding that the OCEAN STATES was liable in rem.

Reaffirming its summary judgment order, the district court entered final

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[1] Baycon and Amoco also sued the owners of the tugs assisting in the tow and Pilot Wiltshire. The court's order exonerated the tugs from liability and by joint stipulation Amoco and Baycon's complaint and OCEAN STATES' third party complaint against Pilot Wiltshire were dismissed with prejudice.

judgment against the Barge OCEAN STATES on the issue of its liability in rem. The issue of damages was severed and has not been tried pending review by this court.

The sole issue in this case, which is uncontroverted by either party, is whether a barge without motor power that is being towed by two tug boats, and the flotilla is under the complete control of a compulsory pilot, is liable in rem for damages caused when that barge, through no fault of its own, but solely that of the compulsory pilot, is towed into a vessel or dock owned by a third-party.

The resolution of this issue depends upon whether or not the barge at the time in question was a "vessel" or a "dead ship". If she was a vessel, she is liable in rem. We hold that the Barge OCEAN STATES was a vessel and is thus liable in rem.

It is stated in Admiralty Law of the Supreme Court § 13-1 (3rd Ed. 1979): "Local state laws may require that vessels operating in state waters be put in charge of pilots licensed by the state. When a vessel is being operated by such a compulsory pilot and it causes damage due to the pilot's negligence, the vessel is liable in an action in rem but there is no personal liability on the owner. See The China, 74 U.S. (7 Wall) 53, 19 L.Ed. 67 (1868).

The same issue is discussed in Benedict on Admiralty. There it is stated: "[t]he shipowner is not personally liable for injuries inflicted exclusively by the negligence of a pilot compulsorily accepted by the vessel but the vessel is liable in rem upon a distinct principle of the maritime law, namely, that the vessel, in whosesoever

hands she lawfully is, is herself considered the wrongdoer liable for the tort and subject to a maritime lien for the damage." 1 E. Benedict, The Law of American Admiralty 362 (6th Ed. 1940).

The author further states that "... [o]ne who ..., through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship." Id. at 17.

"Whenever a debt of maritime nature is by law, ... or by contract, alien upon a vessel, the vessel may be proceeded against in rem." Id. at 22.

In the instant case, Pilot Wiltshire was employed as a pilot to see that the OCEAN STATES, and in fact the entire flotilla, was safely maneuvered from Fina Terminal to Tampa Barge Services. He was

in full command of the entire maneuver. He could have ordered more tugs or released some. His job was to see that the OCEAN STATES was transited without damage to herself nor anyone else. It was stipulated that neither tug was at fault. The China is the complete answer in this case. The China poses this question on page 61 of 74 74 U.S.: "Does the fact that the law compelled the Master to take the pilot, exonerate the vessel from liability?" The China very definitely holds that under American law it does not exonerate the vessel from liability.

The China is still the law. The China was discussed at length by the Ninth Circuit in the case of State of California v. The Italian Motorship Ilice, 534 F.2d 836 (9th Cir. 1976). It summarizes this discussion by saying, "[w]e conclude that there is no basis on this record for hold-

ing that the Supreme Court's rule in The China has been weakened or destroyed. Even if the wisdom of that rule is subject to discussion, if The China is to be overruled for that reason, it should be done by the Supreme Court itself." 534 F.2d at 843.

In the case of Gulf Towing Co., Inc. v. The Steam Tanker Amoco New York, 648 F.2d 242 (5th Cir. 1981), The Harbor Tug TAMPA sank while assisting the Amoco New York, which was piloted by a compulsory pilot. The District Court found that "no fault or negligence of the TAMPA proximately caused or contributed to its sinking and that Amoco Shipping and the crew of the Amoco New York were not negligent and did not cause or contribute to the sinking of the TAMPA." The District Court entered judgment against both the pilot and the Amoco New York, in rem, af-

ter concluding that "the damage to the TAMPA was caused by [the pilot's] negligence which in turn was imputed to the Amoco New York in rem." Although the above noted case was primarily concerned with an exculpatory provision contained in the pilotage agreement, the entire judgment of the district court was affirmed by the Fifth Circuit in a per curiam opinion before Judges Roney, Johnson and Henderson.

The appellant in this case insists that the case must be reversed on the authority of Tampa Ship Repair & Dry Dock Co. v. A.P. St. Phillip, Inc. (The Penn Vanguard), 1971 A.M.C. 1549 (M.D. Fla. 1971), aff'd, 440 F.2d 1193 (5th Cir. 1971). In the district court's opinion in the Penn Vanguard, Judge Lieb in his Finding of Fact No. 2, states that at the time in question, "[the Penn Vanguard] has

been discharged, her machinery was not operating. She was a 'dead' ship." 1971 A.M.C. at 1550. Judge Lieb in his Conclusions of Law No. 3, on page 1553 again stated, "The Penn Vanguard was a dead ship, under tow, and a mere passive instrument by which the damage to the dry dock was occasioned. The Penn Vanguard is not liable, in rem, for damages to the dry dock wall." In affirming Judge Lieb, the Fifth Circuit at 440 F.2d 1193, held that Judge Lieb's Findings were not clearly erroneous.

The Penn Vanguard is distinguishable from the present case in that Judge Lieb held that the Penn Vanguard was a "dead ship". On rehearing, the Fifth Circuit, Judge Tuttle writing for a panel consisting of himself, Judge Ainsworth and Judge Simpson, stated that "this appeal and cross-appeal raises only fact issues." He

further stated, "The Vanguard was a 'dead ship,' and the motor power was supplied by three tug boats, the Mary, the Edward and the Tony." 440 F.2d at 1193. The opinion of the Fifth Circuit does not further discuss the "dead ship" issue, but spends most of the time discussing the quantum of the damage. The opinion states, "Appellees simply argue the trial court's findings were not clearly erroneous." Id. at 1194. The opinion ends with the statement, "The judgment is in all respects affirmed." Id. at 1195. Judge Tuttle in his opinion denying petition for rehearing discussed only the question of admissibility of evidence concerning repairs. The "dead ship" issues apparently was not raised on appeal.

In this opinion, we simply hold that the Penn Vanguard opinion is not controlling because the Barge OCEAN STATES was not

a dead ship but a vessel and the law simply stated is, a vessel being operated by a compulsory pilot which causes damage due to the pilot's negligence is liable in an action in rem.

The Barge OCEAN STATES at the time in question was certainly a vessel as opposed to being a dead ship. The tugs were guilty of no negligence. The injury was caused solely by the pilot's negligence. The pilot's duty was to see that the entire flotilla was maneuvered safely so as not to causes damage to itself or anyone else. The barge, as a part of the flotilla, was certainly being operated by the compulsory pilot.

We base our holding that the OCEAN STATES was not a "dead ship" in view of the following authorities. First, the Third Circuit drew a distinction between a "dead ship" and a "vessel" stating that

where a ship was not properly documented and was not able to sail, but efforts of everyone concerned were bent on readying her for a sealing voyage, the ship was not a "dead ship," that is, a ship withdrawn from navigation and marine commerce, but was a "vessel" subject to admiralty jurisdiction in libel in rem to assert a maritime lien for repairs. Hercules Co. Inc. v. The Brigadier General Absolom Baird, 214 F.2d 66, 69 (3d Cir. 1954). In addition, the Eastern District of Virginia has held that where practically all of the work in deactivating a vessel for the purpose of its return to a moth ball fleet had been completed at the time of an injury on the vessel to a marine surveyor hired to conduct an off-hire condition survey preparatory to final termination of the charter, the vessel was a "dead ship" and was "out of navigation" at the time

and place of the accident and the surveyor was not entitled to recover under the doctrine of unseaworthiness. Noel v. Isbrandtsen Co., 179 F.Supp. 325, 328 (E.D. Va. 1959). Finally, the Eastern District of New York has defined a "dead ship" saying that a vessel which had been completely withdrawn from commerce and navigation and was in such condition that extensive repairs and proper documentation would have been required to return it to navigation and commerce was a "dead ship" not subject to a maritime lien. Hanna v. The Meteor, 92 F.Supp. 530, 531 (E.D.N.Y. 1950). Title One of the United States Code at Section 3 defines a vessel as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The Ship Mortgage Act of 1920, 46 U.S.C § 971, provides in part that any

vessel shall be subject to a maritime lien enforced by a suit in rem.[2]

Judge Brown writing for the Fifth Circuit in the case of Miami River Boat Yard, Inc. v. 60 Foot Houseboat, 390 F.2d 596, 597 (5th Cir. 1968) states, "a houseboat is nonetheless a boat because, as its name implies, it affords a water-born place to live with the added advantage of at least some maritime mobility. That she has no motive power and must, as would the most lowly of dumb barges, be towed does not deprive her of the status of a vessel." He states further, "The Houseboat was a vessel capable of being subjected to a maritime lien and the District Court was in error in holding that it lacked subject-matter jurisdiction

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[2] For citations defining vessels subject to such liens, see note 58 under § 971. For citations defining a dead ship not subject to such liens see note 59.

of the vessel in rem."[3] This is followed by several citations, primarily from the Fifth Circuit.

A reading of the cases distinguishes a dead ship from a vessel by determining whether or not the object in question had or had not been withdrawn from navigation and maritime commerce. The Barge OCEAN STATES was certainly a vessel and not a dead ship.

In reaching a decision in the present case, we do not second guess Judge Lieb as to whether or not the Penn Vanguard was or was not a dead ship. He determined it was and the Fifth Circuit held that his Findings of Fact were not clearly erroneous. The Barge OCEAN STATES had not been withdrawn from navigation, and was

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[3] It is important to note that if a vessel is truly a "dead ship" no maritime lien will attach since there would be no admiralty jurisdiction. See Hercules Co., Inc. v. Brigadier General Absolom Baird, supra.

certainly used in commerce and was certainly not out of navigation; she was a vessel subject to a maritime lien *in rem*.

A "vessel" is subject to a maritime lien. A "dead ship" is not. There is no statutory definition of a dead ship. We are not attempting to set out a definition of a dead ship which would fit every occassion. We simply hold that the Barge OCEAN STATES was a vessel and subject to a maritime lien under the facts in this case.

WE AFFIRM.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3610

AMOCO OIL, Plaintiff-Appellee,

v.

M/V MONTCLAIR, etc., et al., Defendants,

BARGE OCEAN STATES, Her Engines, Tackle, Apparel, etc., In Rem, Defendant-Appellant.

BAYCON INDUSTRIES, INC., etc., Plaintiff-Appellee,

v.

M/V MONTCLAIR, etc., et al., Defendants,

BARGE OCEAN STATES, Her Engines, Tackle, Apparel, etc., In Rem, Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion JULY 23, 1985, 11 Cir., 198_, _____F.2d____).

( )

Before KRAVITCH and HATCHETT, Circuit Judges, and THOMAS*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

*Hon. Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting designation

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-3610

D.C. Docket Nos. 82-23 & 82-24

AMOCO OIL,

Plaintiff-Appellee,

versus

M/V MONTCLAIR, ETC., ET AL.,

Defendants,

BARGE OCEAN STATES, HER ENGINES, TACKLE, APPAREL ETC., IN REM,

Defendant-Appellant.

BAYCON INDUSTRIES, INC., ETC.,

Plaintiff-Appellee,

versus

M/V MONTCLAIR, ETC., ET AL.,

Defendants,

BARGE OCEAN STATES, HER ENGINES, TACKLE, APPAREL, ETC., IN REM,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

Before KRAVITCH and HATCHETT, Circuit Judges, and THOMAS*, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United

States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

---

*Honorable Daniel H. Thomas, U.S. District Judge for the Southern District of Alabama, sitting by designation.

Entered: July 23, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: DEC 4 1985